SUPREME COURT, U. S.

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No. 71-935

In the Supreme Court of the United States

OCTOBER TERM, 1971

OSCAR CHASON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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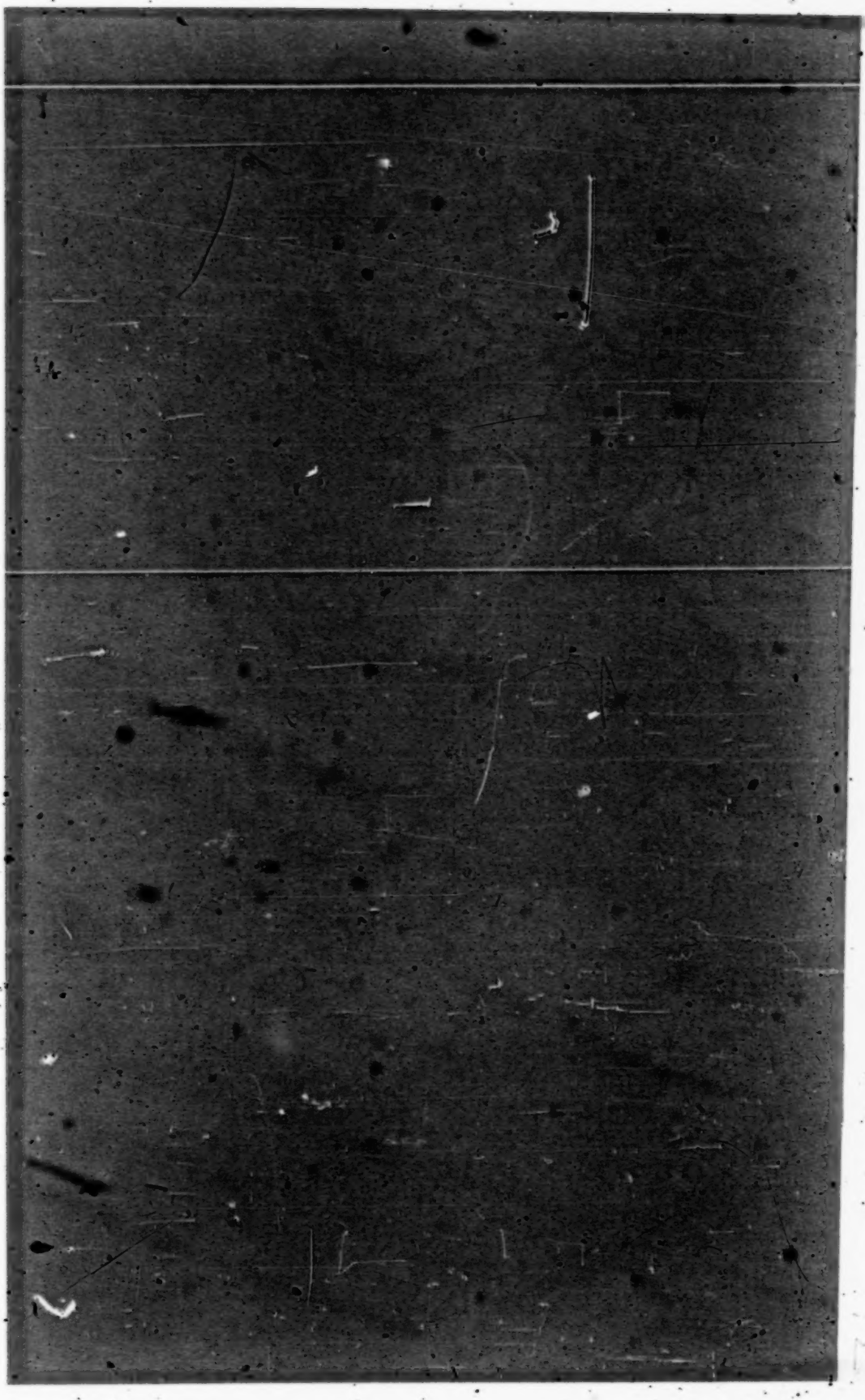

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1971. A petition for rehearing was denied on December 20, 1971. The petition for a writ of certiorari was filed on January 17, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

ISSUES PRESENTED

1. Whether the evidence was sufficient to show petitioner's connection with the scheme to defraud.

2. Whether the court of appeals erred in finding that the exclusion of certain testimony was "harmless error."

3. Whether petitioner was denied the effective assistance of counsel because, unknown to him, his attorney was under indictment in the same district at the time of his trial.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on ten counts charging him with mail fraud, in violation of 18 U.S.C. 1341 (Tr. 266).[1] He was sentenced to a term of imprisonment of nine months on each count, the sentences to run concurrently (III R. 14). The court of appeals affirmed (Pet. App. 1a-10a).

The evidence revealed that in 1968 and 1969 petitioner, a fur dealer, sold airline tickets at one-half their face value. These tickets had originally been purchased through the use of lost or stolen credit cards issued by American Express or Diner's Club (see, *e.g.*, Tr. 17-20, 23-25, 29-32, 48-50, 52, 56, 59-61, 145-148, 162, 217). Three persons, William Heiberger, David Ampel, and Morey Herzog, testified to

[1] "Tr." refers to the trial transcript, a copy of which we are lodging with the Clerk of this Court. Already on file is a three volume record, hereinafter "R."

having bought tickets from petitioner on several occasions. Petitioner told Heiberger and Ampel that the tickets were obtained from people in the fur industry who were in need of money which they could not get through regular channels (Tr. 34, 36, 52).

Petitioner testified that he never realized that the tickets he received and sold were purchased with stolen credit cards (Tr. 168). Most of the tickets he purchased from one Ken DeWald, whom petitioner described as an "operator" from Atlanta, Georgia (Tr. 165, 180-181, 183-184). Petitioner had been introduced to DeWald by Gil Beckley,[2] known to petitioner as a bookmaker (Tr. 165, 182). Petitioner testified that DeWald told him that the tickets came from two sources: (1) salesmen who, in need of cash, purchased the tickets with their own credit cards and then sold them; and (2) advertising brokers who received tickets from airlines in payment for radio and television advertising time (Tr. 165-167).

As part of his defense, petitioner offered the testimony of one Moe Gordon to the effect that Gordon had once overheard DeWald offer petitioner some airline tickets and explain to petitioner that he got them from salesmen who needed ready cash and from advertising agencies which were paid with tickets by various airlines for advertising time (Tr. 155-156). Although the testimony was offered to establish petitioner's state of mind (Tr. 156), it was excluded as hearsay (Tr. 154-156). The court of appeals, while

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[2] Beckley is named as a defendant in the indictment under which petitioner was tried, but was a fugitive at the time of trial.

holding that the exclusion was error, found it to be harmless (Pet. App. 7a-10a).

ARGUMENT

1. The evidence adduced at trial was sufficient to implicate petitioner in the scheme to defraud. The jury could reasonably have rejected petitioner's contention that he, an experienced businessman, had engaged in the numerous dealings over a two-year period, believing that airlines paid for advertising time with tickets bearing the imprint of a credit card belonging to some third person (Tr. 101-103), or that salesmen would buy tickets on credit and sell them at less than full price, incurring the equivalent of enormous interest charges (see Pet. App. 9a).

Other evidence also negates petitioner's assertion that he had no idea how the tickets were purchased. Prior to buying tickets from DeWald, petitioner had bought some tickets from a friend which were void because purchased on an expired credit card. Although he had been informed of this fact by an airline agent, petitioner had used them anyway (Tr. 211-212). Furthermore, petitioner testified that the first time he realized that there was something wrong with the tickets was when one Jerome Zwerdling, to whom he had sold tickets, was arrested (Tr. 173). Zwerdling was arrested on May 18, 1969 (Tr. 221). At the time of petitioner's arrest, almost three months later, petitioner had in his possession a number of airline tickets obtained with lost or stolen credit cards (Tr. 97-99, 101-103). There was also

testimony that at the time of his arrest petitioner offered a bribe to two Diner's Club security officers if they would "help him out" (Tr. 104, 136-137).

The fact that there was no evidence that petitioner either procured the credit cards or initially purchased the airline tickets is no barrier to a finding that he knowingly participated in the scheme to defraud. See *United States* v. *Kelem*, 416 F. 2d 346 (C.A. 9), certiorari denied, 397 U.S. 952. Nor is there any merit to petitioner's contention that his conviction was invalid since all the participants in the scheme to defraud, which petitioner does not deny was shown to exist (Pet. 17), were not identified. Cf. *Hendrix* v. *United States*, 327 F. 2d 971, 975 (C.A. 5).

2. In light of the substantial evidence of petitioner's guilt, the court of appeals did not err in ruling that the exclusion of Gordon's testimony was harmless error. As the court below noted (Pet. App. 8a), the most that Gordon's testimony would have established is that once during a two-year period DeWald gave petitioner a certain explanation for the source of the tickets. While this evidence would have provided some corroboration for petitioner's assertion [3] that he was unaware that the tickets were obtained through the use of lost or stolen credit cards (Tr. 165-167), it is most unlikely that the evidence, even if believed,

[3] Petitioner had not yet testified when Gordon was offered as a witness. After the defense rested, however, he made a motion to reopen and took the stand. That his testimony was not compelled by the exclusion of Gordon's testimony is evidenced by his counsel's statement at the time of the motion that petitioner "has always wanted to take the stand" (Tr. 160).

would have led the jury to reject the other evidence of petitioner's fraudulent intent and change its verdict. There is no rule, as petitioner contends, that the harmless error doctrine cannot be applied to the exclusion of evidence bearing on intent. While *United States* v. *Schultz*, 235 F. 2d 684 (C.A. 7), relied on by petitioner (Pet. 13), held that it was reversible error to exclude evidence going to intent, that ruling was based on "the circumstances of this case." 235 F. 2d at 685.

3. During trial, petitioner was represented by Edmund Rosner (Tr. 1). Unknown to petitioner, Mr. Rosner was at that time under indictment in the Southern District of New York for subornation of perjury and conspiracy.*

Petitioner asserts that Mr. Rosner's indictment necessarily created a conflict of interest and prevented Rosner from effectively representing petitioner. The record, however, reveals that petitioner was vigorously and competently represented, with particular emphasis being placed on the contention that petitioner lacked any fraudulent intent. Other aspects of the defense were also fully pursued. Prior to trial, counsel filed motions requesting a bill of particulars and for discovery and inspection (I R. 8, 10). A pretrial hearing was held on counsel's motion to suppress the airline tickets seized at the time of the petitioner's arrest (II R.). At trial, counsel entered frequent ob-

* That indictment was dismissed on January 24, 1972, for failure to prosecute; the government has filed a notice of appeal.

jections and conducted careful cross-examinations (see, *e.g.*, Tr. 30, 37-42, 50-51, 56-57, 106-112, 118). Counsel objected to testimony concerning statements in regard to a bribe at the time of petitioner's arrest and conducted voir dire examinations into the circumstances surrounding the making of the statements (Tr. 67-93, 117-135). In short, petitioner was fully and competently represented.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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